

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT GREEN, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 02-377; Submitted on the Record;
Issued March 17, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$4,878.26 overpayment; (2) whether the Office properly found that appellant was at fault in creating an overpayment in the amount of \$1,861.42 and, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly denied appellant's request for a prerecoupment hearing as untimely.

On April 5, 2000 appellant, then a 36-year-old letter carrier, tripped while being chased by a dog in the course of his federal employment. He filed a notice of traumatic injury and claim for compensation (CA-1) that same day. In a May 12, 2000 decision, the Office accepted appellant's claim for fractured right wrist. Appellant did not return to work and received compensation for total temporary disability. On June 29, 2000 he returned to full-time light duty at no loss of pay.

The Office placed appellant on the periodic rolls effective June 18, 2000 and he received checks in the amount of \$1,861.42 on July 15, August 12 and September 9, 2000 totaling \$5,584.26.

In a September 6, 2000 letter to appellant from the Office outlining "your entitlement to compensation benefits and your responsibility to return to work." The Office advised:

"NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. (Emphasis in the original). Each payment shows the period for which the payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the Office that you are working."

Included with the letter was Form 1049 showing check cycles and the period of entitlement covered.

In a December 18, 2000 decision, the Office made a preliminary finding that an overpayment occurred in the amount of \$4,878.26, that appellant was not at fault for creating the portion of the overpayment, totaling \$3,016.84, that occurred before he was sent the Form 1049 and that appellant was at fault for creating the portion of the overpayment, totaling \$1,861.42 that occurred after he received the September 6, 2000 letter containing the Form 1049 that informed him that he should return any check covering a period that he worked.

Appellant was further notified in the September 6, 2000 letter that he had 30 days from the date of the letter to request a prerecoupment hearing before a representative of the Branch of Hearings and Review. At that hearing he could address the issues of whether an overpayment occurred, whether he was at fault for the overpayment and whether or not the Office should collect the overpayment.

The Office received no response from appellant. In a February 12, 2001 decision, the Office finalized the preliminary decisions of December 18, 2000.

In a February 26, 2001 letter, appellant requested a hearing before the Branch of Hearings and Review. In an October 24, 2001 letter, the Branch of Hearings and Review denied his request finding that the final decision of an overpayment is not subject to the hearing provision of 5 U.S.C. § 8124(b); and appellant's request, as it relates to the preliminary decision dated December 12, 2000, was untimely as it exceeds the 30-day period.

The Board finds that the Office properly determined an overpayment occurred in the amount of \$4,878.26. In this case, appellant received compensation for the period of June 29 through September 9, 2000 despite the fact that he was working and receiving his full pay during that time and, therefore, was not entitled to disability compensation. The record contains evidence that shows appellant received \$5,584.26 in compensation for the period when he was only entitled to receive \$706.00. Therefore, the Office properly determined that appellant received a \$4,878.26 overpayment.

The Board further finds that the Office properly determined that appellant was not at fault in creating the \$3,016.84 overpayment and was at fault for \$1,861.42 of the overpayment of compensation and that, therefore, that portion of the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act¹ provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.² The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."³

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8129(a).

³ 5 U.S.C. § 8129(b).

No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect....”⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Section 10.433(b) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”⁵

Even though the Office may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed he had returned to work, this does not excuse appellant’s acceptance of such checks which he knew or should have been expected to know should have been returned to the Office.

For the same reasons the Office also properly found that appellant was not at fault for creating the overpayment for the periods prior to his receipt of Form 1049.

The Board further finds the Office properly denied appellant a waiver.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office’s discretion pursuant to statutory guidelines.⁶ These statutory guidelines are found in section 8129(b) of the Act which states: “Adjustment or recovery [of an

⁴ 20 C.F.R. § 10.433(a).

⁵ 20 C.F.R. § 10.433(b).

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”⁷ Since the Office found appellant to be without fault regarding a portion of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.⁸

Section 10.436 of the Office’s regulations⁹ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

“(a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics.”

Section 10.437¹⁰ states that recovery of an overpayment is also considered to be against good conscience if the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

Section 20 C.F.R. § 10.438 states:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

Although appellant was provided with the opportunity, he submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. His contention that he did not receive the preliminary overpayment determination is without merit

⁷ 5 U.S.C. § 8129(b).

⁸ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁹ 20 C.F.R. § 10.436.

¹⁰ 20 C.F.R. § 10.437.

because, in the absence of evidence to the contrary, there is a presumption that a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.¹¹ The December 18, 2000 decision letter had appellant's proper address, there is no evidence to show it was not properly mailed and, therefore, it is presumed it reached appellant's mailing address. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and, therefore, waiver cannot be granted.¹² Further, appellant has not shown that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received while working. Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

The Board further finds that the Office properly denied appellant's request for a hearing made after issuance of a final overpayment decision.

By letter dated September 6, 2000, the Office advised appellant that he had 30 days to request a prerecoupment hearing. Appellant did not respond in 30 days, but rather requested a hearing on February 26, 2001.

Section 10.321(h) of Title 20 of the Code of Federal Regulations clearly establishes that the only appellate remedy available to a claimant after a final overpayment decision has been issued is an appeal to the Board. This section states as follows:

“If additional written evidence is not submitted, or a hearing requested, within the 30-day period [after issuance of the preliminary overpayment decision], the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The final decision concerning an overpayment, whether rendered subsequent to a prerecoupment hearing or in the absence of the submission of additional written evidence, is not subject to the hearing provision of 5 U.S.C. [§] 8124(b) nor the reconsideration provision of [§] 8128(a). An individual aggrieved or adversely affected by a decision concerning an overpayment may request review by the Employees' Compensation Appeals Board.”¹³

Therefore, appellant requested a hearing after the Office's final decision dated February 12, 2001 concerning the overpayment. Accordingly, in view of the limitation on appeals rights set forth in section 10.321(h) of Title 20 of the Code of Federal Regulations, the Office, in its October 24, 2001 decision, properly denied appellant's request for a hearing made after issuance of the final overpayment decision.¹⁴

¹¹ *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

¹² *Id.*

¹³ 20 C.F.R. § 10-321(h).

¹⁴ Appellant alleged that he received improper information from the Office concerning his appeals rights. However, the fact that the Office may have incorrectly advised appellant regarding his appeal rights does not vest rights in appellant which are prohibited by regulations. See *Michael A. Gnoth*, 41 ECAB 988, 992 (1990).

The February 12, 2001 decision of the Office of Workers' Compensation Programs finding an overpayment in the amount of \$4,878.26, that appellant was not at fault for \$3,016.84 of the overpayment and at fault for \$1,861.42 of the overpayment is affirmed. The October 24, 2001 decision denying a prerecoupment hearing is also affirmed.

Dated, Washington, DC
March 17, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member